perty-owner might do; or because the state or nation may confessedly build and maintain railways at the public expense, therefore it is equally competent to aid private enterprises of that character by means of local taxation. If that rule were to be pushed to its logical results it would be made to bring a very large number of private enterprises within the range of aid from public taxation. If the thing is allowable to that extent, it might be made to embrace aqueduct companies and gas companies perhaps, and turnpike companies and plank-road companies, and hotel companies, and many other interests, which the public interest might justify creating at the public expense, provided they could not be accomplished in any other mode. In some portions of the country it is claimed to embrace steam grain-mills and saw-mills! But we have already said more than we intended. We should be rejoiced if any one could point us to any safe limit of taxation in this direction. I. F. R.

Court of Errors and Appeals of New Jersey.

THE PATERSON AND NEWARK RAILROAD COMPANY *v.* FREDERICK STEVENS.

The state is the absolute owner of the land below high-water mark under all navigable water within its territorial limits, and such land can be granted to any one, either public or private, without making compensation to the owner of the shore.

By the local custom of the state the shore owner can reclaim the land between high and low water marks, but such privilege is a mere license which the legislature may revoke at any time before execution.

The rights conferred by the Wharf Act, are also revocable before execution by the land owner.

A statute giving a railroad company the right to lay their road along a river and to acquire the rights of the shore owners, will not be construed to give by implication, the right to take the land of the state lying below the high-water line.

THIS was a writ of error to the Essex Circuit. The suit was in case. The declaration stated that the plaintiff (defendant in error) was the owner in possession of a certain tract of land adjoining the Passaic river, and that said river was a public navigable river and in it the tide ebbed and flowed. That the plaintiff had enjoyed full access from his lands to the river, for the purpose of washing, bathing, watering his cattle, for fishing and navigating, and that the defendants have placed obstructions along the entire water front of said lands, consisting of piles, timbers, &c., whereby the access to the water was cut off.

The plea admitted doing the acts charged, and justified them,

by virtue of the legislative authority contained in the charter of the defendants. The provision relied on gave defendants power "to lay out, construct, and run their railroad along the Passaic river, from the village of Belleville to any point in the city of Newark, at or near Governeur street, and to acquire the rights of the shore owners in the manner prescribed in the charter of said company in other cases, and may extend said road over said river; and for that purpose may construct and maintain a bridge from some convenient point in the city of Newark, at or near Governeur street, * * * * and the said Paterson and Newark Railroad Company may continue said railroad at the distance of not less than one hundred and fifty feet eastwardly of the river road or highway, and connect the same with any other railroad or railroads on the east side of said river, on such terms as may be agreed upon, and may lay out and construct the same, passing under or over the Morris and Essex Railroad, by a suitable bridge or arched passage-way." * * * *

The defendants claimed that this clause gave them the right to lay their road along the river below high-water mark, as such lands belonged to the state.

The plaintiff demurred to this plea, and the Circuit Court sustained the demurrer.

Parker & Keasbey, for plaintiff in error.

Abiel & Frelinghuysen, for defendants.

The opinion of the court was delivered by

BEASLEY, C. J.—The principal question which has been argued in this case is that respecting the interest of the state in the lands lying between high and low water marks in tidal rivers. In some of its aspects this subject is a familiar one to our courts; but on this occasion the point is for the first time distinctly presented, whether it is competent for the legislature to grant the soil under the water so as to cut off the riparian owner from the benefit incident to his property from its contiguity to the water.

Notwithstanding the apparent scepticism of counsel upon the subject, I am constrained to think that some of the matters which were handled in the discussion before the court are to be considered as at rest. In my opinion it is entirely indisputable that the proprietors of New Jersey did not, under the grant from the

Duke of York, take any property in the soil of navigable rivers within the ebb and flow of the tides. This was the very point of decision in *Arnold* v. *Mundy*, 1 Hal. 1; *Martin* v. *Waddell*, 16 Pet. 367; and *Russell* v. *Jersey Co.*, 15 How. 426.

Second. That this title to the soil under navigable water, which the common law of England placed in the king, was transferred by the revolution to the people of this state. The cases above cited completely establish this proposition.

And lastly, in the case of *Gough* v. *Bell*, 2 Zab. 441, it was declared that the owner of lands along the shore of tide-waters could extend his improvements by wharves, and filling up over the shore in front of his lands to low-water mark, unless prevented by the state, provided he did it so as not to interfere injuriously with navigation.

Thus far I regard the law in this state as founded on adjudications which ought not to be questioned, and which cannot be disturbed. Assuming then, as I do, the foregoing propositions as stated, in the discussion now before the court, the point of inquiry is narrowed to the single question which was regarded as left open in the case last cited, viz.: whether the owner of lands on tide-water has such a right to the use of the water that the state cannot authorize any improvement in front of his lands, which will destroy or abridge that right without compensation.

In the discussion of this topic, I will consider briefly, first, the rights, so called, of the riparian proprietor, and in the second place, the rights of the state over the sea shore. First then, with regard to the rights of the owner of the upland. In the case of *Gough* v. *Bell* in this court, I observe that Mr. Justice NEVIUS and Mr. Justice POTTS put their opinion on the ground that the riparian owner, at common law, was invested with certain rights in the water as appurtenant to his estate. And in the case of *Gould* v. *The Hudson River Railroad Company*, 2 Seld. 544, Mr. Justice EDMONDS, in a dissenting opinion, expresses a similar view. I have not found that any other judge has ever based a decision on such a ground. The theory on which these opinions are founded seems to me the result of misconception. The riparian proprietor has a right, says Mr. Justice POTTS, "though his strict legal title is bounded by the high-water line, to the water as appurtenant to the upland, a right of towing on the banks, of landing, lading and unlading, a right of way to the shore, a right to

draw seines upon the upland and of erecting fishing huts," &c., has the right of fishery, of ferry, and every other which is properly appendant to the owner of the soil; and he holds every one of them by as sacred a tenure as he holds the land from which they emanate. The error in this statement arises from overlooking the fact that some of the rights enumerated belong to the riparian proprietor as a member of the community, and that others of them belong to him in his character of owner of the soil. Not one of the privileges in the water which are ascribed to him emanate from his ownership of the land. In common with every other citizen, he can fish in the water, and pass and repass to and from the water along the shore. But he has not these rights by virtue of his property; they attach to him as an individual, and he holds them in common with other citizens. They are part *rerum communium*. Then again, it is true, it is lawful for him to land on the bank, and to dry his nets, and to build fishing huts there. But the right to do these things, and which are not privileges in the water, appertain to him in the ordinary way as the owner of the land. The case is merely this: the man who owns the land next to navigable water is more conveniently situated for the enjoyment of the public easement than the rest of the community. But a mere enumeration of the advantages of that position falls far short of showing that such proprietor has in the *jus publicum*, by the common law, more or higher rights than others. It will be observed that in the sentences above quoted, it is averred that the rights referred to emanate from the ownership of the soil. This is certainly true as to certain of them, such as the right to erect fishing huts, &c., but with respect to the usufruct of the water being appendant to the land in any legal sense whatever, that is the point to be proved, and it is simply assumed. The question is one of mere tradition, precedent, and ancient authority. When and by whom was it ever claimed from the days of Bracton to the present time, that the ownership of the upland drew to it any right in the seashore or in a peculiar use of the water? In the opinion commented on, no common-law authority is cited, and the few American cases referred to are so manifestly misapplied that it is not necessary to subject them to criticism. My examination has been so thorough, that I feel confidence in saying, that none of the ancient authorities can be found, and they, of necessity, must be our guides in this inquiry,

which give countenance to the notion that any such privileges as those claimed, are appurtenant to the bank, or edge of navigable water. Indeed, so far has the bank owner been from making claim to any peculiar privileges of this kind, that the reverse has occurred, and the contested question has been, whether his land for the convenience of the public, was not subject to certain servitudes; whether such land might not be crossed in going to and returning from the water; whether the right to tow boats along the bank, or to land, or to dry nets upon it? These and similar questions have been mooted in the courts, some of which remain unsolved to the present day, while others have been decided, though not without hesitation and difficulty, in favor of the riparian proprietor. In all these controversies, extending from ancient through modern times, I do not find that it was ever even suggested that, as an incident to his estate, the owner of the *terra firma* along the line of tide-water, was possessed of any peculiar privilege, with the exception of those of *alluvion* and *derelictum*, which are, perhaps, countervailed by the loss to which he is subject from the washing away of his land.

That this is the true position of the landowner at the common law, will, I think, more clearly appear, when I come to set forth the rights of the king in the seashore, to which subject I now proceed. The language of the old books is that "the sea is the king's proper inheritance," and he is styled "the Lord of the Great Waste," "*tam aquæ quam soli*": Coke upon Litt. 107, 260 b; Colles 17; 2 Molloy 375. And this was property susceptible of transference. There are some antique instances of grants by kings of England of certain portions of land under the sea. Lord Hale recites several transfers of this description: Hale de Jure Maris, p. 14–28. It is true that such conveyances, at least in modern times, did not pass the property disencumbered of the public rights of navigation and fishing; but still it is clear that the tenure of the soil carried with it certain valuable rights. In fact it appears to have been possessed of the ordinary incidents of property on *terra firma*. It could be put to any use not inconsistent with the public easements with which it was burthened. If it was unlawfully appropriated or interfered with, the law afforded it protection. There are cases both ancient and modern, showing that this *districtus maris*—this land covered with water, was a property susceptible of valuable uses. Thus in the cele-

brated case of *The Royal Fishery in the Banne*, Davies Rep. 149, it is said, "The city of London, by a charter from the king, hath the river Thames granted to them; but because it was conceived that the soil and ground of the river did not pass by that grant, they purchased another charter by which the king granted to them *solum et fundum* of the said river: by force of which grant the city to this day reserves rents of those who fix posts, or make wharves, or other edifices on the soil of said river." It cannot fail to be observed, how entirely this case explodes the assumption that the riparian proprietor has any common-law right to extend his front, either by filling in or by the erection of a wharf. Such acts would have been trespasses on the private property of the sovereign. The modern case illustrative of the same subject, to which I will particularly refer, is that of the *Attorney-General* v. *Chambers*, 4 De Gex, M. & Gordon 206. This was an information against certain owners and lessees of a district abutting on the seashore. The information alleged that by the royal prerogative the sea-shore and the soil, and all mines and minerals lying under the sea, and all profits arising therefrom, belong to her majesty, &c. That there were very valuable veins or strata of coal lying under that part of said district which was contiguous to the seashore; that the seashore vested in her majesty, extended landwards as far as high-water mark in ordinary spring tides, or, at all events, far beyond high-water mark at neap tides, and that the defendants had encroached upon and worked valuable mines under the shore. The general right of the queen as stated was admitted, the only question which was put in controversy being as to the extent of such right. A verdict was taken by consent for the crown, and the court decided that the right of her majesty to the seashore landwards is, *primâ facie*, limited by the line of the medium high tide between the spring and neap tides. This decision was made in the year 1854. From these two cases, it seems to me to be most conspicuous, that the ownership of the shore under the sea drew to it all the usual rights of property. It could be leased out for wharves or worked as a coal mine. We are also to bear in mind, that the seashore could be granted in gross, that is, without being parcel of the upland: Hall on the rights of the Crown, &c., p. 19. I also refer, for a number of examples in which claims of the crown similar to the foregoing have been successfully enforced, to an article in Vol. VI., p. 99,

of the Law Magazine and Law Review. From the essay it appears that "the advisers of the crown for the last quarter of a century have exercised unusual vigilance respecting, and been most active in realizing the royal claims to the foreshores." Among other suitable instances, the following one is thus described: "An earlier case was one of an information for intrusion filed in 1833, by Sir William Horne, when Attorney-General, in the Court of Exchequer to establish the right of the crown to a tract of land containing about two hundred and seventy acres, formerly overflowed by the tide, situate near the city of Chester, on the south bank of the Dee, a tidal navigable river. The suit terminated in favor of the crown, and the land was subsequently sold by the crown." Nor do I find this royal right anywhere in the long line of adjudications upon the subject, called in question. With respect to the general features it is admitted in the fullest extent in the conspicuous modern cases: *Lord Advocate* v. *Sinclair of Foss*, L. R. 1 Scotch Appeals 174; and *Gann* v. *The Free Fishers of Whitstable*, 11 House of Lords Cases 192. Indeed I think it is safe to say that no English lawyer, speaking either from the bench or bar, has ever asserted that the owner of the land along the shore of navigable water has any peculiar right by reason of such property to use of the water or of the shore. And it seems entirely incredible to suppose that such a right as this could have existed, and that no allusion should have ever been made to it. It is obvious that many of the controversies which have been before the courts would have been largely affected by the existence of such a right. Such would have been the effect in the case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works*, the report of which has done hard service in the argument on the present occasion: L. R. 5 Exch. 221. The facts of the case are thus stated: The Duke of Buccleuch, the plaintiff, had a certain interest under a lease and two agreements from the crown in a mansion in Parliament street, the back of which was parallel to and bounded by the river Thames; and the Metropolitan Board of Works, the defendants, had constructed, by force of an Act of Parliament, an embankment between the back of the plaintiff's premises and the river. For the purpose of this construction the Board of Works had found it necessary to remove the area or mass of water which formerly used to run at the back of the premises between high and low water marks, and

also to take away a causeway or jetty running from the foot of some stairs on the plaintiff's land across the shore to low-water mark.

It will be observed that the facts of this case were, in all essential particulars, the same as those embraced in the one now before this court, with the exception that in the reported case the plaintiff had a jetty or causeway extending from his land to low-water mark. The act under which the defendants had erected their embankment required, where land was taken, compensation to be made, and directed that in estimating the purchase-money or compensation to be paid by the promoters "regard should be had" not only to the value of the land to be purchased, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers, &c. The plaintiff's claims for compensation were two-fold: first, for the destruction of the jetty or landing place; and, second, for the taking away of the water which used to flow along the river side of the premises. The court held that the only claims the plaintiff was entitled to were those resulting from the destruction of the jetty or landing place, but that the general damage occasioned by the interposition of the embankment of the defendants along the water front of the premises, were claimed *absque injuria*. This was regarded as a case of great importance, and was fully argued and considered, and yet it was not intimated, either by counsel or any of the parties, that the plaintiff, as riparian proprietor, had any right the deprivation of which was a legal injury, or afforded even any just ground for complaint. In the whole case there is not a hint of the supposed existence of such a right.

From these authorities, and many others which might be cited, it appears to me to be plain that by the rules of the ancient law the owner of land along the shore was entitled to no right as an incident of such ownership except the contingent ones before referred to of *alluvion* and *derelictum;* and that, on the other hand, the title to the soil under tide-water was in the sovereign, and that such title was attended with the usual concomitants of the ownership of realty. And it consequently followed, from other results, that in order to enable the owner of the upland to fill in or wharf out below the line of high water it was absolutely necessary to

adopt some principle different from those of the common law. And this, as I understand, was the foundation on which the majority in this court placed themselves in the decision of the case of *Gough* v. *Bell*. That final decision was a concurrence in the view expressed by Chief Justice GREEN in his opinion delivered in the Supreme Court, and that view was, as I apprehend, the only one which could invest the claim of the landowner to extend his lands by artificial means below the line of high water with the faintest substance of legality. As such claim could not rest on the common law, it was indisputable to invoke and sanction a custom or local usage variant from the common law. How far such a custom, as a mode of acquiring a title to real estate, has been made to harmonize with legal principles it is not necessary to inquire, for, as before remarked, I consider the existence and legality of such a usage to be *res adjudicata* in this state. Admitting its legal existence, then, the inquiry presses as to its effect in law. It confers a right by the legal exercise of which, the bank owner may encroach on the public property between high and low water marks. If such a right existed by force of the common law as an incident of property, it is obvious it could not be destroyed or substantially injured by the legislative power, without compensation. The question is whether this customary right has the same quality and efficiency as though it appertained to the land by force of the common law. A consideration of this branch of the subject has led to the conviction that such privilege has not the effect suggested in the above inquiry. The local custom in question was nothing more than a license on the part of the public to the landowner enabling the latter to fill in or wharf out along the foreshore between high and low water marks, and which license when executed became irrevocable. The shore-owner acquired his indefeasible right by the acquiescence of the public in the performance of the act. That this was the view of the judges whose opinions prevailed in the decision of *Gough* v. *Bell*, is, in truth, clearly manifest. I have above observed that the true doctrine with respect to this local custom is embodied in the opinion read by Chief Justice GREEN in the Supreme Court. In that opinion this clear statement with respect to the necessity of the execution of the license as pre-requisite to the acquisition of a legal right on the part of the landowner, is to be found, viz.: "In New Jersey, as we have seen, the title of the state extends as at com-

mon law to high-water mark as it actually exists. Where these waters have receded by alluvion or by the labor of the adjoining proprietor the title of the land does not extend beyond the actual high-water line. That every *encroachment upon the shore or other part of the public domain must at all times be restricted or controlled by the legislature, is admitted.* That any erection prejudicial to the common rights of navigation or fishery may be abated, is not denied. But in the absence of such legislative restriction, where no nuisance is created the riparian proprietor may appropriate the shore between high and low water mark to his own use." This language is too clear and explicit to need explanatory comment. That the local customs of the state which are recognised and enforced by the court, operated as a simple license to the riparian owner to enlarge his possession at the expense of the public domain, and which license was revocable at any time before execution, is the clear doctrine of the adjudication in question. It has no reach beyond this, and from that time to the present I do not perceive that the judiciary of this state have been in any doubt upon this subject, and whenever the doctrine has been referred to, the question has been treated as being entirely at rest. In the year 1856, in the case of *The State* v. *Mayor and Common Council of Jersey City*, 1 Dutch. 525, certain lands lying under the flow of the tide were thrown out of a tax assessment for the reason that the title to rent lands was in the state, and Mr. Justice ELMER, with characteristic directness of expression, defines the public right thus: It must now be accepted as the established law in New Jersey that the right of the owner of lands bounding on a navigable river extends only to the actual high-water mark, and that all below that mark belongs to the state. The inchoate right, if such it may be called, which the proprietor of the upland has either with or without a license to acquire an exclusive right to the property, by wharving out or otherwise improving the same, gives him no property in the land while it remains under the water. It may be granted by the State to a stranger at any time before it is actually reclaimed and annexed to the upland. Such is unquestionably the common law, and I am aware of no alteration of it in this respect in New Jersey." In this opinion Chief Justice GREEN, Justices OGDEN and HAINES, concurred.

Again, after an interval of several years, the rule was treated

by the same court as established. I refer to the case of *Stewart* v. *Fitch & Boynton*, 2 Vroom 18. This was a suit by a riparian owner for the use of certain flats, by the rafts and lumber of the defendants, and among other reasons given for dissent to the legality of the plaintiff's claim, the court said, "but it also appears that the flats on which the rafts were anchored were all below high-water mark, and at high tide covered to the depth of two feet, and that no part had been in any wise improved or reclaimed, and that consequently the title to them was not in the plaintiff, but in the state of New Jersey." From these cases I think it evident that from the date of the decision of *Gough* v. *Bell*, up to the time of the present controversy, the question now under consideration has not been considered an open one by the courts of this state. And such too appears to have been the legislative and public understanding of the effect of this leading decision, just mentioned at the time that it was rendered. This I think is manifest from other provisions of the Act of 1851, entitled "An Act to authorize the owners of lands upon tide-waters to build wharves in front of the same." Nix. Dig. 1025. By the first section of the act it is declared, "That it shall be lawful for the owner of lands situate along or upon tide-waters to build docks or wharves upon the shore in front of his lands, and in any other way to improve the same, and when so built upon or improved to appropriate the same to his own exclusive use." Thus we find in this provision, and in similar provisions, in many other laws, the local custom, sanctioned in the case of *Gough* v. *Bell*, assuming a statutory form and subjected to certain general restrictions. The right of the bank-owner was dealt with by the legislature not as an incident of property already vested, but as a privilege which required the element of public acquiescence and the performance of a pre-requisite on the side of the proprietor to be converted into a legal right. Nor should it fail to be observed that even if we were to admit the indefeasibility of this customary right of the shore-owner, such concession could not have much effect in securing him against the exercise of legislative power. By force of such a doctrine the land lying between the high and low water lines could not be taken from him without compensation, but below the low-water line the public right and contract would be still absolute. But I have said such concession cannot be made. The bank-owner has by the local custom

of the state, but an inchoate right before the reclamation of the land below the water; nor does he gain anything in this respect by the statute just referred to. That act did not add anything to the efficiency of the local custom as a mode of acquiring title. It left that right as it found it, a pure license revocable before execution. Such acts bearing the form of legislative licenses are not uncommon, and their effect has been clearly defined. It has never been thought that the privileges conferred by them were vested rights in the sense of debarring the public from revoking them at pleasure.

Two cases in point, which have arisen in Pennsylvania, I will refer to as illustrative of the principle. By a statute of that state all persons owning lands adjoining navigable streams were authorized to erect dams in such streams, and appropriate the water to the uses of their mills. In the cases of *The Susquehanna Canal Company* v. *Wright*, 9 Watts & Serg. 9, and *The New York & Erie Railway* v. *Young*, 33 Penna. 175, it was declared that the rights acquired under this act were not indefeasible, but were subordinate to the rights of the commonwealth. This result was justified by the theory that such licenses took their privileges under the implied condition that they should be held in subordination to the requirements of the public. These decisions go to the point that a legislative permission to appropriate to individual use a part of the *jus publicum* does not, *per se*, deprive the public of a right to resume the privilege granted, unless it appears that it was the intention to vest such privileges irrevocably in the licensee. The wharf act in this state clearly leaves, in this respect, nothing in doubt, for it expressly announces that after the riparian proprietor has, in point of fact, erected his wharf or made any other improvement below the high-water line, then, and not till then, the land so appropriated shall become his own. Prior to this event he has no rights in the water or the land under it either by the statute or by the local custom which are not subservient to the legislative will.

The steps which I have thus far taken have led me to this position: that all navigable waters within the territorial limits of the state and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estates; and that the privileges he possesses by the local custom

or by force of the Wharf Act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature.

The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high-water mark. It may be true that by such an appropriation the plaintiff will sustain a greater inconvenience than will other citizens whose land does not run along this river. But the injury to all is in its essence and character the same, the difference being only in degree. All persons who have occasion to approach this river over that part of the bank occupied by the railroad of the defendants may, perhaps, experience some inconvenience from the interposition of such works: the railroad therefore is somewhat of an impediment to the public rights of fishery and navigation. But no one, it is presumed, will pretend that such impediment is on that account illegal, if authorized by the legislative authority. Nor can the plaintiff complain because a difficult access to the water is a greater hardship to him, owing to the easy use of the water in connection with his property in its natural condition, than it is to those who live at a distance from it. If it were true that no public improvement can be made which, in its execution, will affect the property of one citizen more injuriously than it will that of another, many of the greatest works of the times would become impossible. No railroad or canal can be constructed which will not greatly benefit the lands of some persons, and injure, almost as greatly, those of others. Every citizen is required, at times, to contribute something, by way of sacrifice, to the public good. Such partial evil is the price which is paid for the advantages incident to the social state. It is not necessary to refer extensively to authority in confirmation of the doctrine that, as a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals from the exercise of such control gives no legal claim to compensation. The principle seems universally conceded that, unless in certain particulars provided by the Federal Constitution, the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute. By force of the constitution of this state private property cannot be taken, even for public use, without just compensation. But

the dominion of the legislature over the *jura publica* appears to be unlimited. By this power they can be regulated, abridged, or vacated. We have seen that, by the common law, the king was the proprietor of the soil under the navigable water, and this being regarded as a private emolument of the crown was susceptible of transfer to a subject. But such transfer did not divest or diminish, at least after Magna Carta, the public rights in the water; and, consequently, the grantee of the crown held the property in subjection to the common privilege of fishery and navigation. The consequence was that the king could not deprive the subjects of the realm of these general rights. This was a power that resided in Parliament, and not in the monarch. But that such a parliamentary power existed, appears never to have been questioned by any English authority, nor do I perceive that its exercise was ever regarded as a legal wrong, or even as an unusual hardship to the owner of the land along the shore. In the year 1780 this authority of Parliament to put to use the land under tide-water, thus intercepting the landowner, was fully recognised by Lord MANSFIELD. The case referred to is that of *The King* v. *Smith*, Douglass 441. The city of London, under an act in the time of George the Third, had erected piles in the bed of the Thames, near Richmond, within high-water mark, about the distance of 29 feet from the shore, for the purpose of making a towing-path for horses adjoining and contiguous to a wharf in the possession and the property of the defendants or of those under whom they claimed. The defendants cut down one of these piles which was proved to have been erected between the high and low water marks opposite to the said wharf. For this act an indictment was found and the defendants were convicted. The case came before the court on a motion to arrest judgment. In the argument of the case none of the distinguished counsel employed for the defence questioned the right of Parliament to appropriate the land in question in the manner specified, if the wharves, at the point in question, were within the reach of the tide, the entire predication being that such was not the fact. The conviction was sustained. I think the power of Parliament in affairs of this character is not to be denied. Nor was this one of those severe prerogatives which existed only in consequence of the theoretic omnipotence of the legislative branch of the British government. Whatever the theory, we know what the practice

has been, and it is scarcely too much to say that, since the days of the revolution, no instance can be found of any Englishmen being deprived of any right of property by Act of Parliament. A statute putting to use the land under tide-water was regarded as legitimate, not because the power of Parliament was unlimited, but because the control over the public domain was unlimited. And in fact the absence of a power to control and put to use the public interests in the navigable waters would be an imperfection in the civil polity of any people. I do not find that it has ever been supposed that such a power did not exist in any of the American states. By a statute of the state of Delaware a citizen was authorized, for the purpose of improving his lands, to close the mouth of a navigable creek, and such statute was pronounced to be constitutional, and the act done under it, legal, by the Supreme Court of the United States. *Wilson* v. *Black Bird Creek*, 2 Pet. 245. In *Glover* v. *Powell*, 2 Stock. 211, a similar law was enforced, and in the case of *The Mayor of Georgetown* v. *The Alexandria Canal Co.*, 12 Pet. 91, it was held competent for Congress, acting as the local legislature, to authorize the erection of the canal in question, although the same was admitted to be injurious to the interests of the riparian owners. This same doctrine was enforced in the case of *Gould* v. *Hudson Railroad Co.*, 12 Barb. 616, 2 Seld. 522, on a scale of the greatest magnitude, the road of the defendants being located along the Hudson, and intervening for many miles between the water and the land of the bank-owners. See a collection of cases to the same effect in Angell on Tide-waters 92–108. It is upon this principle that water in large quantities is taken from our rivers to feed our canals, and that dams are placed to the destruction of navigation in our rivers for the use of manufactories. Our state affords many instances of a display of this power in this form. With regard to the hardships oftentimes incident to the exercise of such a power the courts can have no concern, such considerations address themselves exclusively to the law-makers. It is the office of the court to declare if the law leads to such result that the legislalature has the authority to regulate or destroy, at pleasure and for the common welfare, the public rights in navigable rivers, and that if individuals are, in consequence thereof, incidentally injured, such loss is *damnum absque injuria*. If compensation be made for such damage it is on the part of the state a mere gratuity,

for neither the riparian proprietor nor any other citizen whose property has been impaired can claim such redress as a matter of legal right. In all such cases the appeal must be to the sense of justice of the legislature.

The result being that the legislature can authorize the laying of this road in front of the land of the plaintiff, without compensation, the next question is, has such a privilege been conferred on the defendants. The claim is that the legislature has granted to these defendants the use of a part of the public domain. The state is never presumed to have parted with any part of its property in the absence of conclusive proof of an intention to do so. Such proof must exist either in express terms or in necessary implications. I shall not cite authorities to sustain so familiar a proposition. With respect to this statute now drawn in question, and by the supposed force of which the defendants have erected their works, I fully concur in the view expressed by Mr. Justice DEPUE, in the opinion read by him in the Circuit Court. I think there are no terms used in this statute which, fairly interpreted, imply an intention to confer on the defendants the privilege asserted, nor does such privilege necessarily result from the general powers conferred. This plea, therefore, presents no bar to the action of the plaintiff.

With respect to the question raised in the argument touching the sufficiency of the facts stated in the plaintiff's declaration to sustain his suit, I will merely say that it seems to me that a legal cause of action is shown. The substantial allegation is that in consequence of the works of the defendants he is prevented from passing from his land to the river Passaic, which at present is a public highway. Now it is true, that as the defendants have put these obstructions in this river without authority of law, such obstructions are a public nuisance. But I think it is a nuisance which, according to the allegations on the record, inflicts a peculiar damage on the plaintiff, and if that be so it is admitted this action is well brought. The plaintiff, until the state interferes and deprives him of the privilege, has the right to pass directly from his property on to the shore of this navigable river. He has been deprived of the right by the tort of the defendants, and this is a damage which apparently is individual and peculiar to himself. If a ditch should be dug in a public highway in front of the door of a dwelling-house, so as to cut off access to and from such house,

no one would doubt that the occupier of such house sustained a greater inconvenience from the public nuisance than the body of the community. The character of the present tort as it respects the plaintiff is precisely of this nature. I think the facts stated supported the action.

The judgment of the Circuit Court is affirmed.

United States Circuit Court, District of Missouri.

W. C. BEAN, ASSIGNEE OF CHARLES S. KINTZING, BANKRUPT, *v.* JAMES H. BROOKMIRE AND THOMAS RANKIN, JR.

Money paid by a debtor to his creditor more than four months before the commencement of proceedings in bankruptcy by or against such debtor, cannot be recovered back from such creditor by the assignee of the bankrupt, although the creditor knew that such payment was made to him by way of preference, and that the debtor was insolvent at the time of making such payment and that the same was made in contemplation of insolvency or bankruptcy.

The two clauses of the 35th section of the Bankrupt Law differ in this, that the first clause is limited to a creditor or a person having a claim against the bankrupt, or who is under liability for him, and who receives money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him and is under no liability for him.

The word "payment" in the first part of the second clause of this section is used either inadvertently or in a loose sense with respect to some of the acts mentioned in this clause, but is intentionally omitted from the list of transactions which are declared void under this clause of the section.

The 35th and 39th sections of the Bankrupt Act are not in conflict with respect to this question. The latter section enumerates the various acts which subject a person to involuntary bankruptcy, and that is the main purpose of the section, and the fact that a preference, given by a debtor to a creditor within six months next before the filing of the petition against him in contravention of the terms of this section, is denounced as an act of bankruptcy; and that the money so paid may be recovered back by the assignee, is not inconsistent with the limitation of the right in the 35th section to cases occurring within six and four months of the commencement of bankruptcy proceedings.

The 35th and 39th sections having set up a rule at variance with the common law and with the statutes of most of the states, by which certain payments and transfers of property are declared void, very properly limit and define the circumstances within which this new rule should operate.

THIS was a writ of error to the District Court for the Eastern District of Missouri.

The plaintiff in error brought his suit to recover, as assignee of the bankrupt, the sum of $1436 paid to the defendants within